

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Richard K. Wilborn,
Petitioner,
v.
Jason Gunther,
Respondent

No. CV 24-02062-PHX-SRB (MTM)

REPORT AND RECOMMENDATION

TO THE HONORABLE SUSAN R. BOLTON, SENIOR UNITED STATES
DISTRICT JUDGE:

Petitioner Wilborn filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. Doc. 1.

I. SUMMARY OF CONCLUSION

Invoking the First Step Act, Petitioner asserts that the Bureau of Prisons has violated federal law by limiting earned time credits to low-risk inmates, that he is entitled to earned time credits from the time his sentence was imposed, and that his earned time credits were improperly withheld. The Court finds that the Petition is not ripe for resolution and that Petitioner has not exhausted his administrative remedies within the Bureau of Prisons. Accordingly, the Court will recommend that the Petition be denied and dismissed without prejudice.

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1 **II. BACKGROUND**2 **A. FSA**

3 Under the First Step Act (“FSA”), by participating in programming, federal inmates
 4 earn time credits towards an earlier release date. An eligible inmate “who successfully
 5 completes evidence-based recidivism reduction programming or productive activities,
 6 shall earn time credits,” 18 U.S.C. § 3632(d)(4)(A)(i), that are applied “toward time in
 7 prerelease custody or supervised release.” 18 U.S.C. § 3632(d)(4)(C).

8 **B. Petitioner**

9 Petitioner was sentenced in February 2022 to an 84-month term of imprisonment
 10 for federal convictions. Doc. 13-1 at 6. The Bureau of Prisons (“BOP”) has determined
 11 Petitioner to be a low risk for recidivism and has applied 290 days of earned time credits
 12 towards his early release. *Id.* at ¶ 17.

13 **III. PETITION FOR WRIT OF HABEAS CORPUS**

14 On August 14, 2024 Petitioner filed his habeas petition (doc. 1), asserting that (1)
 15 the BOP has violated federal law by limiting earned time credits to low-risk inmates, that
 16 (2) he is entitled to earned time credits from the time his sentence was imposed, and that
 17 (3) the BOP improperly disciplined him by withholding earned time credits.

18 On December 23, 2024, Respondent filed an Answer, challenging this Court’s
 19 jurisdiction and asserting that Petitioner has failed to properly exhaust his administrative
 20 remedies. Doc. 13 at 6-7.

21 **IV. DISCUSSION**22 **A. Subject Matter Jurisdiction**

23 Federal courts have an independent obligation to examine their own jurisdiction.
 24 *See Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000). In *Reeb v. Thomas*, 636
 25 F.3d 1224, 1227 (9th Cir. 2011) the Ninth Circuit noted that 18 U.S.C. § 3625 specifies
 26 that judicial review under the Administrative Procedures Act is not applicable to any
 27 determination, decision, or order “made pursuant to 18 U.S.C. §§ 3621-3624.” As amended
 28 by the FSA, 18 U.S.C. § 3624(g) “details the criteria for when a prisoner becomes eligible,

1 considering earned time credit, for transfer to prerelease custody or supervised release.”
 2 *Bottinelli v. Salazar*, 929 F.3d 1196, 1197-98 (9th Cir. 2019). “A habeas claim cannot be
 3 sustained based solely upon the BOP’s purported violation of its own program statement
 4 because noncompliance with a BOP program statement is not a violation of federal law.”
 5 *Reeb*, 636 F.3d at 1227. Accordingly, a district court lacks jurisdiction to adjudicate the
 6 merits of a petition alleging only “that the BOP erred in his particular case.” *Id.* at 1228.
 7 In contrast, judicial review *is* available where a habeas petition alleges “that BOP action is
 8 contrary to established federal law, violates the United States Constitution, or exceeds its
 9 statutory authority.” *Id.*

10 In claim one Petitioner alleges that BOP’s failure to grant earned time credits to all
 11 inmates, “irrespective of their recidivism risk assessment score” is “in direct contradiction
 12 to Congress’ intent, and in violation of established law” (doc. 1 at 5-6); in claim two
 13 Petitioner alleges that in failing to grant earned time credits “from the time sentence is
 14 imposed,” BOP ignores the statutory definition of when a sentence “commences.” Doc. 1
 15 at 7-9. Under *Reeb*, both those claims allege violations of federal law in a manner sufficient
 16 to invoke this Court’s jurisdiction.

17 **B. Ripeness**

18 Relying on 18 U.S.C. § 3624(g)(1)(A), Respondent asserts that the Petition is not
 19 ripe for resolution, because Petitioner’s accumulated earned time credits of 290 days do
 20 not equal the time remaining in his sentence. Accordingly, Respondent asserts that
 21 Petitioner is not yet eligible under the statute to have his earned time credits applied to his
 22 sentence computation. Doc. 13 at 14-15.

23 The ripeness doctrine is designed to “prevent the courts, through avoidance of
 24 premature adjudication, from entangling themselves in abstract disagreements over
 25 administrative policies, and also to protect the agencies from judicial interference until an
 26 administrative decision has been formalized and its effects felt in a concrete way by the
 27 challenging parties.” *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807-08
 28 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

1 At the time of Respondent's Answer, Petitioner's projected release date, excluding
 2 earned time credits, was May 1, 2027. Doc. 13 at 14. Even assuming that Petitioner
 3 maintains his eligibility to apply his earned time credits (by remaining a low recidivism
 4 risk), he is not eligible to apply his earned time credits to his sentence until July 15, 2026,
 5 when his earned time credits would be "equal to the remainder of [his] imposed term of
 6 imprisonment." Doc. 13 at 14-15.

7 This Court agrees with Respondent that the Petition is not ripe for resolution. *See*
 8 *Velasquez v. Gunther*, 2025 WL 1135304, at *3 (D. Ariz. March 4, 2025) (finding Petition
 9 not ripe where Petitioner was not eligible for application of earned time credits), Report
 10 and Recommendation *adopted by* 2025 WL 113524 (D. Ariz. April 17, 2025).
 11 Accordingly, this Court recommends that the Petition be dismissed without prejudice.

12 **C. Petitioner's Failure to Exhaust Administrative Remedies**

13 Petitioner acknowledges he did not exhaust his administrative remedies. Doc. 1 at
 14 3. He requests that his failure to exhaust be excused, as it would be "an exercise in futility"
 15 to require exhaustion, because "BOP would enforce its own regulation." *Id.* at 4.

16 The *Reeb* Court noted that inmates may challenge the BOP's discretionary
 17 determinations through the BOP's administrative remedy program. 636 F.3d at 1227.
 18 Ordinarily, absent exhaustion, a court should dismiss a petition without prejudice or stay
 19 the proceedings until administrative remedies have been exhausted. *See Leonardo v.*
 20 *Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011).

21 Under the facts of Petitioner's case, this Court will not excuse Petitioner's failure to
 22 exhaust his administrative remedies, as his failure to do so has impeded preparation of a
 23 useful record and frustrated judicial economy. *See Jones v. Bock*, 549 U.S. 199, 219 (2007).
 24 In particular, the Court notes that Petitioner's third claim – that he was improperly
 25 disciplined by the withholding of earned time credits – presents a factual dispute that would
 26 likely have been resolved if Petitioner had engaged in the administrative review process.
 27 Respondent asserts that it is not factually correct that Petitioner was disciplined as he
 28 claims. Specifically, Respondent disputes that Petitioner lost earned time credits as a

1 disciplinary sanction, noting that Petitioner's loss of commissary privileges, loss of
 2 telephone privileges, loss of social visitation privileges and other sanctions do not
 3 constitute loss of earned time credits. Doc. 13 at 15, and Doc. 13-1, Ex. A, at 8 (declaration
 4 of Shaleen Ruelas, detailing Petitioner's disciplinary history). On this record, the BOP's
 5 administrative remedy process, not this Court, is the proper forum for the resolution of that
 6 factual dispute.

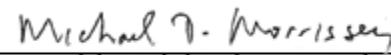
7 **V. CONCLUSION**

8 **IT IS THEREFORE RECOMMENDED** that the Petitioner's Petition for Writ of
 9 Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1) be **DENIED** and **DISMISSED**
 10 **WITHOUT PREJUDICE.**

11 This recommendation is not an order that is immediately appealable to the Ninth
 12 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
 13 Appellate Procedure, should not be filed until entry of the district court's judgment. The
 14 parties shall have 14 days from the date of service of a copy of this Report and
 15 Recommendation within which to file specific written objections with the Court. *See* 28
 16 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have 14 days
 17 within which to file a response to the objections.

18 Failure to timely file objections to the Magistrate Judge's Report and
 19 Recommendation may result in the acceptance of the Report and Recommendation by the
 20 district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,
 21 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the
 22 Magistrate Judge will be considered a waiver of a party's right to appellate review of the
 23 findings of fact in an order of judgment entered pursuant to the Magistrate Judge's Report
 24 and Recommendation. *See* Fed. R. Civ. P. 72.

25 Dated this 14th day of May, 2025.

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 27 Honorable Michael T. Morrissey
 28 United States Magistrate Judge